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PART II: PUBLIC LAW

CRIMINAL PROCEDURE: THE EXCLUSIONARY RULE

Sol Lovas

The police commit an illegal search. The defendant moves to suppress the evidence they find because it was obtained through a violation of his rights. The court agrees, and the evidence cannot be used against the defendant at his trial. This is the exclusionary rule in action. Contested evidence is excluded if the search violated the defendant's rights, and it is admitted if no violation occurred; thus the process of deciding whether to exclude evidence defines the content of our rights. The content, however, is subject to adjustment and refinement as courts face new technology, changing philosophies, and varying fact situations. Montana law is no stranger to change, and this is reflected in the Montana Supreme Court's decisions during the survey period which discuss the exclusion of evidence. This article presents a review of those decisions, with an analysis of the changes they introduce into the law of the rights guarded by the exclusionary rule.

I. SEARCH, SEIZURE, AND PRIVACY

The United States Supreme Court effectively rewrote the Fourth Amendment's guarantee against unreasonable searches and seizures in *Katz v. United States*:¹ it no longer prohibits invasions of "constitutionally protected areas;"² now it prohibits violations of "the privacy upon which [one] justifiably [relies]."³ The Montana Supreme Court absorbed this change of theory from property to privacy, and adopted the new approach for use in interpreting the search and seizure provisions of Montana's constitution.⁴ The Mon-

1. 389 U.S. 347 (1967). The Fourth Amendment states:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

2. 389 U.S. at 351.

3. *Id.* at 353.

4. The court noted the change of theory from property to privacy in *State v. Brecht*, 157 Mont. 264, 270, 485 P.2d 47, 50 (1971), held in *State v. Finley*, — Mont. —, —, 566 P.2d 1119, 1123 (1977), that Montana's constitutional search and seizure provisions, MONT. CONST. art. II, § 11 (*see n. 23 infra*), afford an individual the same protection as the

tana Constitution also contains an express right of privacy which the court applies to search and seizure cases: "The right of individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest."⁵ The Montana Supreme Court's decisions in *State v. Charvat*,⁶ *State v. Sawyer*,⁷ and *State v. Brackman*⁸ were based on these two concepts of constitutional privacy. They reveal three important developments: (1) the court's growing acceptance of privacy theories in the search and seizure context; (2) the court's use of the express right of privacy to place greater restrictions on police conduct than are required by the federal constitution; and (3) the evolution of a search and seizure analysis which integrates the protection afforded by the search and seizure provisions with the protection afforded by the express right of privacy.

Charvat illustrates the search and seizure concept of privacy. An officer seized marijuana plants he found growing in a field. *Charvat* claimed the seizure violated his search and seizure immunities and moved to exclude the plants from evidence. The court held the plants were admissible evidence under the "open fields" doctrine, which provides that any evidence found in "open fields" is admissible, even if seized without either probable cause or a warrant.⁹ The court did not just state the rule, however. It went on to explain that the doctrine's true significance lay in its recognition of the fact that although a person may subjectively expect privacy in a field, that expectation is not reasonable and so is not protected by the search and seizure provisions.¹⁰ This analysis parallels the approach to the Fourth Amendment adopted by the United States Supreme Court in *Katz*.¹¹ Through *Charvat*, the Montana court confirmed *Katz*'s substitution of privacy analysis for property analysis and adopted a standard for determining what privacy is protected—subjective

Fourth Amendment, and followed the *Katz* privacy analysis in *State v. Charvat*, ___ Mont. ___, 573 P.2d 660 (1978). But see *State v. Lane*, ___ Mont. ___, 573 P.2d 198 (1977) (discussed *infra*, section II(B)).

5. MONT. CONST. art. II, § 10.

6. ___ Mont. ___, 573 P.2d 660 (1978).

7. ___ Mont. ___, 571 P.2d 1131 (1977).

8. ___ Mont. ___, 582 P.2d 1216 (1978).

9. ___ Mont. at ___, 573 P.2d at 661. The "open fields" doctrine was an outgrowth of the pre-*Katz* property approach to Fourth Amendment protection. The Fourth Amendment protected homes from unreasonable searches and seizures by its very words, but the United States Supreme Court held in *Hester v. United States*, 265 U.S. 57 (1924), that its protection of homes could not be spatially expanded to include fields some distance from a dwelling. Therefore the Fourth Amendment's requirements did not have to be satisfied in order to seize evidence from such "open fields."

10. ___ Mont. at ___, 573 P.2d at 663.

11. 389 U.S. at 351.

expectations of privacy which are objectively reasonable.¹²

Charvat did not rely on Montana's express constitutional right of privacy, but *Sawyer*¹³ did. Sawyer's car was impounded and thoroughly searched to inventory its contents, which included drugs. The court held that because an inventory search is a "substantial infringement upon individual privacy," it must meet both the "reasonableness" standard of the search and seizure provisions, and the "compelling state interest" standard of the right of privacy.¹⁴ The state's asserted justifications—protecting the owner's valuables from theft and the police from claims for lost property—did not meet these standards, and the drugs were excluded from evidence at Sawyer's trial. The decision is important for two reasons. First, the federal constitution permits inventory searches,¹⁵ so this case marks the Montana court's first major break with the growing conservatism of the Burger Court.¹⁶ Second, the decision establishes that a warrantless search must comply with *both* the search and seizure and the privacy provisions of the 1972 Montana Constitution.

Brackman, on the other hand, was decided *solely* on Montana's express constitutional right of individual privacy.¹⁷ In that case, the police placed a radio transmitter on an informant, who then engaged Brackman in a conversation which the police overheard and recorded.¹⁸ Brackman claimed that the warrantless electronic monitoring of the conversation violated his right of privacy. The court said that the key to his claim was whether he could "justifiably rely" on his expectation that his conversation would not be transmitted to others without his knowledge and consent.¹⁹ The court decided that he could and held that the state had to justify its violation of Brackman's constitutionally protected privacy expectation by a showing of a compelling state interest, rather than a show-

12. The two-step formulation adopted by the court was suggested by Justice Harlan in his concurring opinion in *Katz*, 389 U.S. at 361.

13. ___ Mont. at ___, 571 P.2d at 1133.

14. *Id.*

15. *S.D. v. Opperman*, 428 U.S. 364 (1976).

16. "We need not consider the Fourth Amendment issue because we view the Montana Constitution to afford an individual greater protection in this instance than is found under the Fourth Amendment in *Opperman*," *State v. Sawyer*, ___ Mont. ___, ___, 571 P.2d 1131, 1133 (1977).

17. ___ Mont. at ___, 582 P.2d at 1220.

18. During the conversation, Brackman threatened the informant over some money the informant owed him, thereby committing the offense of intimidation under MONTANA CODE ANNOTATED [hereinafter cited as MCA] § 45-5-203 (1978) (formerly codified at REVISED CODES OF MONTANA (1947) [hereinafter cited as R.C.M. 1947], § 94-5-203).

19. ___ Mont. at ___, 582 P.2d at 1221.

ing of probable cause.²⁰ The court did not agree with the state that the statutory exemption of public officials from criminal liability for recording conversations demonstrated a compelling state interest, and it excluded from evidence the officer's testimony about the conversations. The *Brackman* decision is important for three reasons.²¹ First, it marks the Montana court's second major divergence from the Burger court, for warrantless electronic participant monitoring is permissible under the federal constitution.²² Second, it declares that a showing of probable cause will not by itself justify violations of the right of individual privacy. Third, it continues the process, begun in *Sawyer*, of integrating the privacy and search and seizure provisions of Montana's constitution.

The integration problem is this: both the privacy and search and seizure provisions can apply to one set of search and seizure facts. They are, however, stated in two separate sections of the constitution,²³ and the two sections contain different standards for

20. *Id.* at —, 582 P.2d at 1222.

21. The *Brackman* decision is also important for a fourth reason: its effect on the use of electronic surveillance in Montana. *Brackman's* practical effect is that the police must now obtain a warrant before engaging in electronic participant monitoring if they want to use the evidence they will acquire, with one clear exception—the police may still “bug” an informant for his own protection. *Id.* at —, 582 P.2d at 1221. The opinion states that the police may not use any evidence acquired in this manner, but illegally seized evidence is, as a general rule, admissible for collateral uses such as grand jury investigations, impeachment, and parole revocation hearings. The same collateral use rule may apply to evidence obtained through a “protective bug.” See also n. 84 *infra*.

Brackman does not decide whether warrantless electronic participant monitoring, apart from “bugging for protection,” is ever permissible. The opinion notes only that “[i]n all of the cases examined, none revealed the circumstances were so exigent that the law enforcement personnel would not have had time to obtain a search warrant.” — Mont. at —, 582 P.2d at 1221.

The principal problem facing electronic participant monitoring in the wake of *Brackman* is the fact that Montana's search warrant statutes, MCA §§ 46-5-201 to 206 (1978) (formerly codified at R.C.M. 1947, §§ 95-703 to 708), are not readily adaptable to electronic surveillance. Section 46-5-202 (formerly § 95-704 (Supp. 1977)) permits a search warrant to issue upon probable cause, but *Brackman* requires a compelling state interest. Under section 46-5-203 (formerly § 95-705), a search warrant may authorize the seizure of instruments, articles, or things; but does that include words? Section 46-5-206 (formerly § 95-708) requires the police to exhibit the warrant when they conduct the search, but informing a suspect that he is under surveillance destroys the value of the surveillance. Unless and until the search warrant statutes are either revised or liberally interpreted, obtaining a search warrant for electronic participant monitoring in Montana is not feasible.

(Compliance with federal statutes is not a problem, because the federal statutes regulating electronic surveillance specifically exempt participant monitoring from their coverage. 18 U.S.C. § 2511(2)(c), (d) (1976)).

22. *United States v. White*, 401 U.S. 745 (1971).

23. Privacy:

The right of individual privacy is essential to the well-being of a free society / and shall not be infringed without the showing of a compelling state interest.

MONT. CONST. art. II, § 10.

Search and seizure:

judging the constitutionality of police conduct: for privacy, the standard is a "compelling state interest;" for search and seizure, it is "reasonableness." To further confuse things, the search and seizure provisions contain the *Katz* privacy element, which is protected by that section's "reasonableness" standard. In addition, a third standard must be considered: search warrants may not issue but upon "probable cause." This situation presents the court with the challenge of developing a comprehensive search and seizure analysis which reconciles these various protections and standards, a challenge the court is beginning to answer.

The first step is to integrate the protection afforded by the two sets of provisions. *Charvat* dealt with the search and seizure concept of privacy, while *Brackman* dealt with Montana's express constitutional right of privacy, but both relied on the United States Supreme Court's decision in *Katz* in deciding whether the defendant's expectation of privacy was constitutionally protected. *Brackman* followed the "justifiable reliance" approach of the *Katz* majority; *Charvat* followed the "subjective expectation which is objectively reasonable" approach suggested by Justice Harlan in his concurrence in *Katz*.²⁴ "Justifiable reliance," however, is a conclusion, while Justice Harlan's approach is a standard for determining what reliance is "justifiable." Therefore, the latter approach should be adopted as the standard for deciding what expectations of privacy are constitutionally protected in Montana.²⁵ Adopting one standard for the two concepts of privacy would unify, as well as greatly simplify, the search and seizure field.

The effect of one standard would be that violations of any expectation of privacy which fit the criteria would have to satisfy all three of the constitutional tests: probable cause, reasonableness, and compelling state interest. This is precisely the double protection intended by the constitutional convention when it deleted a phrase relating to privacy from the search and seizure provisions because it feared including the phrase would permit the higher protection afforded individual privacy to be watered down in the search

The people shall be secure in their persons, papers, homes and effects from unreasonable searches and seizures. No warrant to search any place, or seize any person or thing shall issue without describing the place to be searched or the person or thing to be seized, or without probable cause, supported by oath or affirmation reduced to writing.

MONT. CONST. art. II, § 11.

24. 389 U.S. at 361 (Harlan, J., concurring).

25. Justice Harlan's approach to privacy was adopted by the Alaska Supreme Court in interpreting Alaska's express constitutional right of privacy. *Smith v. State*, 510 P.2d 793 (Alaska 1973), cert. denied, 414 U.S. 1086.

and seizure context.²⁶ This is also the approach followed in *Sawyer*, where the court held the inventory search of an impounded car to both the "reasonableness" and "compelling state interest" standards.²⁷

This brings us to the second step in reconciling the search and seizure and privacy provisions: integrating the standards for judging the constitutionality of police conduct which violates protected privacy. "Reasonableness" and "probable cause" were long ago integrated by the general rule that a search without probable cause is unreasonable. The integration of these standards with the right of privacy's "compelling state interest" standard begins with the realization that neither "reasonableness" nor "probable cause" is a state interest. The state interest which underlies the search and seizure provisions is the state's compelling interest in acquiring the evidence necessary to convict criminals. Without evidence, our chosen system of societal control would fail.²⁸ This interest is not expressed in the search and seizure provisions, but neither is the countervailing personal interest—individual privacy. What is expressed is the permissible *means* through which a state may act to further its interest: a reasonable search, based upon probable cause and a warrant.

Two hundred years ago, that was enough protection. Today, it is not, as the 1972 addition of the right of individual privacy to Montana's constitution indicates. The "compelling state interest" standard, which was selected to safeguard our privacy,²⁹ has always incorporated a stringent means analysis, as the United States Supreme Court recognized in a decision based on the federal constitutional right of privacy: "Where certain 'fundamental rights' are involved, the Court has held that regulation limiting these rights may be justified only by a 'compelling state interest' . . . and that legislative enactments must be narrowly drawn to express only the legitimate state interests at stake. . . ."³⁰ Both requirements of the

26. The original Bill of Rights Committee Proposal for MONT. CONST. art. II, § 11 read: "The people shall be secure in their persons, papers, homes, and effects from unreasonable searches and seizures *and invasions of privacy*. No warrant" (Emphasis added.) The phrase "and invasions of privacy" was deleted on the convention floor. Transcript of the Proceedings of the Montana Constitutional Convention 5203 (1972).

27. — Mont. at —, 571 P.2d at 1133.

28. Keeping the peace is one of government's most basic functions. Since we have chosen an adversarial, innocent-until-proven-guilty system for determining whether an individual has defied our prohibition of certain acts, the state must be able to acquire evidence of guilt even if those who hold the evidence do not choose to release it.

29. The "compelling state interest" standard was adopted on the convention floor after a lively debate. Transcript of the Proceedings of the Montana Constitutional Convention 5711-15 (1972).

30. *Roe v. Wade*, 410 U.S. 113, 155 (1973) (citations omitted) (emphasis added).

standard must be satisfied.

The Montana Supreme Court applied the "compelling state interest" standard to a warrantless search in *Sawyer*³¹ and *Brackman*,³² and in both cases found the search unconstitutional. Yet the *Brackman* opinion contains the statement, "[a] decision in favor of defendant would not outlaw electronic monitoring, but only impose a warrant requirement before proceeding."³³ A search warrant, therefore, satisfies the "compelling state interest" standard. That is as it should be, for the state's interest in acquiring evidence of crimes is "compelling," and Montana's search warrant provisions are, in general, drawn narrowly enough to express only that interest while protecting privacy as much as possible.³⁴

The state's general interest in acquiring evidence should not, however, be considered compelling enough to justify a warrantless search. The question in this context is not what will justify a search; it is what will justify proceeding *without the substantive and procedural safeguards of a warrant*. Indeed, the heart of the *Brackman* opinion was that although the state could have justified the search if the police had obtained a warrant, the state could not justify the search in the absence of a warrant. Only two interests seem compelling enough to justify a warrantless search: the state's interest in protecting its officers, and the state's interest in preventing the loss or destruction of evidence. Both require immediate action.

It is now clear that the Montana Supreme Court will apply Montana's express constitutional right of individual privacy in the

31. ____ Mont. at ____, 571 P.2d at 1133-34 (inventory search of Sawyer's impounded car).

32. ____ Mont. at ____, 582 P.2d at 1222 (warrantless electronic participant monitoring of Brackman's conversation).

33. *Id.* at ____, 582 P.2d at 1221.

34. Montana's search warrant provisions are found in MONT. CONST. art. II, § 11 (see n. 23, *supra*), and in MCA §§ 46-5-201 to 206 (1978) (formerly codified at R.C.M. 1947, §§ 95-703 to 708). The basic requirements are a judicial determination of probable cause, a particular description of the place to be searched and the things to be seized, and reasonableness in the scope of the search. The availability of the exclusionary rule to (1) deter violations of the search warrant provisions, and (2) remedy any such violations, serves as a further safeguard. (This suggests that the exclusionary rule may be a constitutional necessity under the right of privacy, rather than merely a "remedial device." See *Calandra v. United States*, 414 U.S. 338, 349 (1974)).

Although the search warrant provisions in general are constitutionally valid under this analysis, some past interpretations of the statutes might fall as permitting too broad an invasion of privacy (such as the decision in *State v. Quigg*, 155 Mont. 119, 467 P.2d 692 (1970), that a warrant, which authorized the police to seize "any other property or evidence they might find that may connect to the demise" of the decedent, was not a "general warrant," and hence not unconstitutional). Any attack on a warranted search would have to challenge the statutes, but the statutes can be attacked in two ways: (1) "on their face," as not drawn narrowly enough to protect privacy as much as possible, or (2) "as applied," as permitting too broad a search given the facts of the case.

search and seizure context,³⁵ and will use it to place greater restrictions on police conduct than the federal constitution requires. The next step, necessary to ensure the right of privacy's protection against police intrusions into our lives and homes, is to fully integrate this new constitutional provision into all phases of search and seizure analysis.³⁶ The right of privacy will not destroy police ability to search and seize evidence. The warrant procedures remain valid; most warrantless searches are based on either protecting the officer or preventing the loss of evidence. It will, however, limit the police to those methods which are necessary, rather than merely helpful, in their fight against crime.³⁷ Thus the right of privacy is an important safeguard to ensure that the police do not step beyond the bounds of their legitimate duties.

II. WARRANTLESS SEARCHES

Montana's express constitutional right of privacy is so new, and as yet so nebulous, that virtually all search and seizure cases are decided solely under the search and seizure provisions.³⁸ Even if the

35. For a discussion of the many areas where the right of privacy could be applied, see Towe, *A Growing Awareness of Privacy in America*, 37 MONT. L. REV. 39 (1976).

36. A further refinement of the analysis could be balancing the degree of the invasion of privacy against (1) the level of justification for the intrusion and (2) the availability of other means of acquiring the evidence. For instance, the state has a much greater interest in electronically monitoring a ransom call from a kidnapper than in tapping the phone of a small-time pusher, even if there is probable cause for both searches. The former case involves a life-threatening crime with possibly no other means of obtaining the evidence; the latter involves a less serious crime with better investigative techniques available.

A different balancing pattern is revealed by the suggested approach to search, seizure, and privacy: as the weight of the compelling state interest decreases (acquiring evidence isn't as critical as protecting the life of an officer), the stringency of the "means" analysis increases (acquiring evidence requires a warrant; protecting the officer doesn't).

Remember also that it is possible to challenge the classification of certain activity as criminal, on privacy grounds (i.e. possession of marijuana, abortion).

37. An example: Under *Chimel v. Cal.*, 395 U.S. 752 (1969), the police may search both the person of an arrestee and the area within his "immediate control" for (1) weapons with which he might resist arrest or try to escape, and (2) evidence which he might try to destroy. The underlying justifications for this rule are the two state interests suggested above as compelling enough to justify a warrantless search. Therefore, the rule survives. What changes is the permissible scope of the search. *Chimel's* "immediate control" test has been interpreted very broadly. See, e.g., *United States v. Wysocki*, 457 F.2d 1155 (5th Cir. 1972) (upholding the search of a box in a closet when the arrestee was seated in the middle of the room). The right of privacy's "means" analysis would limit the police to the least intrusive search possible under the circumstances.

38. The only search and seizure cases decided so far on Montana's express constitutional right of privacy are *State v. Brackman*, ___ Mont. ___, 582 P.2d 1216 (1978) (warrantless electronic participant monitoring), and *State v. Sawyer*, ___ Mont. ___, 571 P.2d 1131 (1977) (inventory search of impounded car). A very few earlier cases relied on an implied constitutional right of privacy. *State v. Coburn*, 165 Mont. 488, 530 P.2d 442 (1974); *State v. Brecht*, 157 Mont. 264, 485 P.2d 47 (1971). Some search and seizure opinions mention privacy,

right of privacy were fully developed, much of the existing case law on search and seizure would remain binding, since (1) search warrants and many warrantless searches would remain valid, and (2) any search falling within both the privacy and the search and seizure provisions would have to comply with both sets of requirements.³⁹ The right of privacy is not, however, fully developed, especially with respect to the scope of the protection it affords privacy. Montana's Supreme Court could select a standard for determining which expectations of privacy are protected by the express constitutional right which differs from the standard used for search and seizure privacy analysis. In that event, the right of privacy would not apply to many search and seizure cases.⁴⁰ At any rate, unless counsel presents privacy arguments to the court, search and seizure cases will continue to be decided solely under the search and seizure provisions, and the greatest number of such cases involve warrantless searches.

A. Search Incident to Arrest

As a general rule, a search must be authorized by a valid search warrant, or any evidence seized will be excluded from evidence. The most important exception to this general warrant requirement is that the police may search the person they have arrested and the area within his "immediate control" in order to protect themselves and prevent the destruction of evidence.⁴¹ The Montana Supreme Court discussed several aspects of this exception during the survey period.

In two cases, *State v. Meadors*⁴² and *State v. Means*,⁴³ the search preceded the arrest. The question was whether this reversed order invalidated the search. The court said in *Meadors*:

We hold that a search incident to a lawful arrest is not rendered illegal simply because it precedes rather than follows the arrest. This rule is subject to three limitations: (1) the officer must

without relating it to a constitutional concept. See, e.g., *State v. Means*, ___ Mont. ___, 581 P.2d 406 (1978) (discussed *infra*, section II(D)).

39. Although the right of privacy, where it applies, will mostly serve to limit the scope of the search and seizure provisions, it is at least theoretically possible that a search justified by a compelling state interest may nevertheless be either unreasonable or based on something less than probable cause.

40. In addition, at least one decision by the Montana Supreme Court, *State v. Lane*, ___ Mont. ___, 573 P.2d 198 (1977) (discussed *infra*, section II(B)), suggests that Montana's search and seizure provisions retain some protection of property interests, which would lie outside the scope of the privacy provisions.

41. *Chimel v. Cal.*, 395 U.S. 752 (1969). See also n.37, *supra*.

42. ___ Mont. ___, 580 P.2d 903 (1978).

43. ___ Mont. ___, 581 P.2d 406 (1978).

be able to arrest, (2) the arrest must be "substantially contemporaneous" with the search, and (3) the search must be within the permissible scope of search incident to arrest.⁴⁴

The court gave its reasons for adopting the rule in *Means*: (1) the practical difficulty of ascertaining the time of arrest, and (2) the practical necessity of searching first to prevent the destruction of evidence.⁴⁵

*State v. Jetty*⁴⁶ posed the timing question in reverse: whether a search which occurs some time after an arrest is valid. In *Jetty*, as in the earlier case of *State ex rel. Kotwicki v. District Court*,⁴⁷ the defendant was arrested for a traffic violation and was searched at the station house before being placed in a cell. The marijuana found on Kotwicki was admitted. In excluding the marijuana found on Jetty, the court distinguished *Kotwicki* on the basis that Kotwicki could not make bail and so was jailed overnight, while Jetty's bond was on its way and he was placed in a holding cell only because the police were shorthanded.⁴⁸ Thus the validity of a delayed search depends on the facts.

The permissible scope of a search incident to arrest was held by the United States Supreme Court in *Chimel v. California*⁴⁹ to extend only as far as the "area within [the arrestee's] immediate control—construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence."⁵⁰ The Court specifically overruled prior cases which allowed a broader search.⁵¹ The Montana Supreme Court applied *Chimel's* "immediate control" test in *State v. Cripps*⁵² to invalidate the warrantless search of Cripps's car which was conducted while Cripps was handcuffed outside the car. That was correct, but in *State v. Means*,⁵³ the court relied indirectly on the very cases overruled in

44. ____ Mont. at ____, 580 P.2d at 905. The dissenting justice accused the court of creating a cause of action for false search in cases where the police search first, find nothing, and do not arrest. *Id.* at ____, 580 P.2d at 909 (Shea, J., dissenting).

45. ____ Mont. at ____, 580 P.2d at 411.

46. ____ Mont. ____, 579 P.2d 1228 (1978).

47. 166 Mont. 335, 523 P.2d 694 (1975).

48. ____ Mont. at ____, 579 P.2d at 1230. This holding that "standard police procedure" will not by itself justify a full body search parallels the holding in *State v. Sawyer*, ____ Mont. ____, 571 P.2d 1131 (1977) (discussed *infra*, n. 68), that "standard police procedure" will not justify a full inventory of an impounded car.

49. 395 U.S. 752 (1969).

50. *Id.* at 763.

51. *Id.* at 766. The overruled cases were *United States v. Harris*, 331 U.S. 145 (1947) (permitting a four-room search), and *United States v. Rabinowitz*, 339 U.S. 56 (1950) (permitting a one-room search).

52. ____ Mont. ____, 582 P.2d 312 (1978).

53. ____ Mont. ____, 581 P.2d 406 (1978).

Chimel to uphold the search of the "most likely hiding places" in the house where Means was arrested, a search which included several rooms.⁵⁴ That was not correct. Relying on overruled cases, even indirectly, is not a good practice.

B. Plain View

A second major exception to the general warrant requirement is the "plain view" rule that any incriminating object which is inadvertently discovered by an officer who is legally permitted to be where he is is admissible evidence.⁵⁵ In *State v. Lane*,⁵⁶ an officer standing outside Lane's mobile home saw marijuana plants on the inside windowsill. He entered the home, arrested Lane, and seized the plants. The court excluded the plants from evidence, holding that this was not a valid "plain view" search for two reasons.

First, the court held that evidence found in "plain view" cannot be seized without a warrant unless there are "exigent circumstances," that is, circumstances which render obtaining a warrant impracticable. Lane was not aware that the officer noticed the plants, so the officer could have returned later with a search warrant and seized the plants then.⁵⁷

Second, the court said the formal plain view doctrine does not comprehend "pre-intrusion observation of evidence within a 'constitutionally protected area,' such as defendant's mobile home, from a vantage point outside the 'constitutionally protected area.'"⁵⁸ Because the officer spotted the plants before he entered the home, the plants were excluded. This holding is important not only because it places a limitation on plain view searches, but also because its "constitutionally protected area" language marks a reversion to property analysis of search and seizure cases.⁵⁹

C. Automobile Searches

A third exception to the general warrant requirement is that the police may search an automobile without a warrant if they have

54. The court directly relied on its prior decision in *State v. Callaghan*, 144 Mont. 401, 396 P.2d 821 (1964) (permitting the search of a basement when the defendant was arrested on the first floor), which relied on the cases overruled in *Chimel*, see n.51 *supra*.

55. See *Coolidge v. N.H.*, 403 U.S. 443 (1971); *State v. Gallagher*, 162 Mont. 155, 509 P.2d 852 (1973).

56. — Mont. —, 573 P.2d 198 (1977).

57. *Id.* at —, 573 P.2d at 201.

58. *Id.* at —, 573 P.2d at 202.

59. *Katz v. United States*, 389 U.S. 347 (1967) marked a change in search and seizure cases from property analysis of Fourth Amendment protection to a privacy analysis. See the discussion of *Katz* and *State v. Charvat*, — Mont. —, 573 P.2d 660 (1978), *supra*, section I.

probable cause to believe it contains contraband.⁶⁰ The Montana Supreme Court enunciated a major limitation upon this doctrine in *State v. Cripps*.⁶¹ That case involved a narcotics buy set up by the police, who then arrested Cripps at the scene of the buy and searched his car. The court excluded all evidence found in the car because the state failed to show the existence of "exigent circumstances," that is, circumstances under which obtaining a warrant is impracticable.⁶² Thus the "automobile exception" in Montana requires both probable cause and exigent circumstances.⁶³

If a car is impounded by the police, federal law permits them to fully search the car to inventory its contents, with or without any probable cause.⁶⁴ The Montana Supreme Court considered this rule in *State v. Sawyer*,⁶⁵ but rejected it as permitting violations of Montana's express constitutional right of privacy⁶⁶ and stated its own rule: because the police are only gratuitous bailees of an impounded car, their standard of care is satisfied by inventorying those items in plain view from outside the car, rolling up the windows, locking the doors, and safeguarding the keys.⁶⁷ The state's interests in protecting the car's contents from theft and the police from claims for lost property do not justify a broader search.⁶⁸

The state tried a new approach to the automobile problem in *State v. Rader*.⁶⁹ The police suspected, but did not have probable cause to believe, that the furniture in Rader's truck was stolen. The police stopped Rader's truck and arrested him. The state tried to justify the stop under Montana's "stop and frisk" statute⁷⁰ which permits the police to stop "any person" they have "reasonable cause to suspect" has committed a crime. The court responded, "[I]t is

60. The United States Supreme Court established the exception in *Carroll v. United States*, 267 U.S. 132 (1925), because automobiles and their contents can quickly be moved out of the area. See also *Coolidge v. N.H.*, 403 U.S. 443 (1971); *Chambers v. Maroney*, 399 U.S. 42 (1970).

61. — Mont. —, 582 P.2d 312 (1978).

62. *Id.* at —, 582 P.2d at 314.

63. The decision which adopted the "automobile exception" for Montana, *State v. Spielman*, 163 Mont. 199, 516 P.2d 617 (1973), did not discuss the requirement of "exigent circumstances" implicit in *Coolidge v. N.H.*, 403 U.S. 443 (1971).

64. *S.D. v. Opperman*, 428 U.S. 364 (1976).

65. — Mont. —, 571 P.2d 1131 (1977).

66. MONT. CONST., art. II, § 10, See the discussion of *Sawyer*, section I, *supra*.

67. — Mont. at —, 571 P.2d at 1134.

68. The court specifically limited its holding to cases where the sole justification of the inventory search is standard police procedure with regard to impounded cars. Plain view searches, searches based on probable cause, the searches with warrants are unaffected by the *Sawyer* decision. *Id.*

69. — Mont. —, 581 P.2d 437 (1978).

70. MCA §§ 46-5-401 and 402 (1978) (formerly codified at R.C.M. 1947, § 95-719 (Supp. 1977)).

inconceivable how stop and frisk can be applied to the stop of a defendant in a moving vehicle."⁷¹

D. Warrantless Search Clause as a Condition of Probation

*State v. Means*⁷² presented the court with a new type of warrantless search. Means was placed on probation, subject to the condition that "the defendant shall submit himself, his residence and vehicle to search at any time by Probation Officers, Peace Officers, or other lawful authorities, without a search warrant and without a need to show probable cause."⁷³ The police later searched Means's home under the authority of this clause, found drugs, and arrested Means. Means challenged the legality of the search.

The court held that the search was a valid search incident to arrest, but then proceeded to discuss the validity of the warrantless search clause.⁷⁴ The court observed that Montana's sentencing statute permits a court to impose upon a probationer any "reasonable conditions considered necessary for rehabilitation or for the protection of society,"⁷⁵ and found that requiring submission to warrantless searches is instrumental in achieving both objectives. The court then adopted California's philosophy that "[t]he probationer, like the parolee, has what is euphemistically known as a reduced expectation of privacy."⁷⁶ In view of this, the warrantless search clause was plainly reasonable and therefore a proper condition of probation.

A strong dissent⁷⁷ argued that probationers do retain a significant expectation of privacy, especially since Montana has an express constitutional right of privacy. The question then becomes whether the probationer consented to warrantless invasions of his privacy. The dissenters answered negatively, insisting that consent

71. ____ Mont. at ____, 581 P.2d at 440.

72. ____ Mont. ____, 581 P.2d 406 (1978).

73. *Id.* at ____, 581 P.2d at 407 (quoting the language from the decree of probation).

74. The court said: "As our holding above [on search incident to arrest] disposes of this case, this issue [the validity of a warrantless search clause] need not be reached in this opinion. However, we determine that limited discussion of a central facet of this issue is necessary." ____ Mont. at ____, 581 P.2d at 412. The United States Supreme Court has not yet ruled on this question, and authority elsewhere is split.

75. MCA § 46-18-201(1)(b)(v) (1978) (formerly codified at R.C.M. 1947, § 95-2206(1)(b)(v)) (emphasis added).

76. *People v. Bremmer*, 30 Cal. App.3d 1058, 106 Cal. Rptr. 797, 800 (1973) (quoted in *Means*, ____ Mont. at ____, 581 P.2d at 413). The court did not specify why it chose to join California other than to say that the California approach seemed the "more rational approach." *Means*, ____ Mont. at ____, 581 P.2d at 413.

77. ____ Mont. at ____, 581 P.2d at 413 (Daly, J., dissenting) (concurred in by Shea, J.).

is coerced when the alternative to consent is prison.⁷⁸

The precedential value of the majority opinion is questionable for several reasons. First, although privacy formed the core of the majority's decision, Montana's express constitutional right of privacy was never mentioned. Second, the opinion focused on whether the warrantless search clause was permissible under Montana's sentencing statutes, rather than on whether imposing the clause violated Means's constitutional rights. Third, the police had probable cause for the arrest and search in *Means*, so the court has not faced the more difficult question of whether a warrantless search clause will validate searches based upon suspicion or whim. Fourth, even with such favorable facts, the majority opinion was joined by only three justices and was accompanied by a strong dissent on the merits by two justices. Fifth, because the search in *Means* was independently valid,⁷⁹ the court's statements about the warrantless search clause are dicta. The question now is whether the court will feel itself bound by its dicta in *Means*.

III. PROBABLE CAUSE

With few exceptions, the threshold requirement for a constitutionally valid arrest, search, or seizure is probable cause:⁸⁰ the state must be able to show that before the police acted, they had reliable information which established the probability that a particular individual committed a crime (arrest), or that particular evidence was at a particular place (search and seizure). The principal sources of this information are police observations and informants' tips.

If the only basis for probable cause is an informant's tip, federal constitutional law requires the police to provide the judge with the facts and circumstances (1) upon which the informant based his conclusions, and (2) from which the judge can determine whether the informant is reliable.⁸¹ The Montana Supreme Court's decision in *State v. Leistiko*⁸² modified this rule by distinguishing between

78. *Id.* at ___, 581 P.2d at 416.

79. See n. 74 *supra*.

80. The warrantless search clause situation is one possible exception. The others are "stop-and-frisk," see MCA §§ 46-5-401 and 402 (formerly codified at R.C.M. 1947, § 95-719 (Supp. 1977)), plain view searches, see *State v. Lane*, ___ Mont. ___, 573 P.2d 198 (1977), and consent searches, see MCA § 46-5-101 (1978) (formerly codified at R.C.M. 1947, § 95-701).

81. *Aguilar v. Tex.*, 378 U.S. 108 (1964). If the police are applying for a search warrant, the facts must be in the application for the warrant. See *State v. Leistiko*, ___ Mont. ___, 578 P.2d 1161 (1978) (search warrant). If the police are justifying a warrantless arrest or search, the facts must be revealed by testimony at the suppression hearing. See *State v. Robey*, ___ Mont. ___, 577 P.2d 1226 (1978) (warrantless arrest).

82. ___ Mont. ___, 578 P.2d 1161 (1978).

two types of informants.⁸³ "Citizen-informants" are victims or witnesses of crime, who act out of citizenship; they are reliable. "Informants" act for other reasons and must be proven reliable. The court warned that the label "citizen-informant" is just as conclusive as the label "reliable," but it appears from this decision that the proof of reliability requirement is satisfied by proof of "citizen-informant" status.⁸⁴

The other principal source of probable cause information is police observations. Two Montana cases in the early 1970s determined that an officer's perception of the odor of burning marijuana tends to establish probable cause to believe someone is committing an offense in the officer's presence, thus justifying a warrantless arrest.⁸⁵ The question raised in *State v. Schoendaller*⁸⁶ was whether the odor of burning or burnt marijuana, by itself, establishes such probable cause. The court said "such perception falls closer to the realm of suspicion than probable cause"⁸⁷ and excluded all evidence found through the search incident to Schoendaller's consequently illegal arrest.

In *State v. Rader*,⁸⁸ the police arrested Rader because an officer thought the furniture in Rader's truck belonged to his friend. Only later did the friend report that his furniture had been stolen.⁸⁹ The court excluded the furniture from evidence for lack of probable cause for the arrest. In essence, the case says that until the police have probable cause to believe a crime has been committed, they cannot have probable cause that anyone committed it.

83. *Id.* at ___, 578 P.2d at 1164.

84. A different question about how one may prove an informant's reliability is prompted by the court's holding in *State v. Brackman*, ___ Mont. ___, 582 P.2d 1216 (1978), that an informant may be "bugged" for his own protection when he meets a suspect. *See* n. 21, *supra*. *Brackman* says that the police cannot use any evidence obtained through the "protective bug," but can the police testify as to what they heard through the "bug" in order to verify that the informant's report is accurate?

85. *State v. Bennett*, 158 Mont. 496, 493 P.2d 1077 (1972); *State v. Hull*, 158 Mont. 6, 487 P.2d 1314 (1971).

86. ___ Mont. ___, 578 P.2d 730 (1978).

87. *Id.* at ___, 578 P.2d at 734. This conclusion that odor alone is not sufficient to establish probable cause was confirmed by the court in *State v. Means*, ___ Mont. ___, 581 P.2d 406 (1978):

It is clear that Hull and Bennett stand for the proposition that the odor of burning or burnt marijuana, *together with other facts tending to establish probable cause*, is sufficient justification for an officer to enter for the purpose of effectuating an arrest and searching incident thereto.

Id. at ___, 581 P.2d at 409 (emphasis added).

88. ___ Mont. ___, 581 P.2d 437 (1978).

89. The friend checked his cabin to see if his furniture had been stolen only because his officer friend called and asked him about it.

IV. CONFESSIONS

Once there is a valid arrest based upon probable cause, the question arises whether an arrestee's statements to the police are admissible evidence. The United States Supreme Court held in *Miranda v. Arizona*⁹⁰ that statements made by a person in custody must be excluded unless the state can prove (1) that the police fully informed him of his rights to counsel and silence (the *Miranda* warning), and (2) that he waived his rights.

The court emphasized the importance of a proper *Miranda* warning in *State v. Johnson*⁹¹ by holding that testimony that Johnson was "given his rights" was not sufficient proof of a proper warning, because it did not indicate what Johnson was told about his rights. That being the only evidence of a warning, Johnson's subsequent confession was suppressed.

The seventeen-year-old defendant in *State v. District Court*⁹² was properly warned, but both he and his mother signed written waivers before he made any incriminating statements. The court voided the waivers because of two Montana statutes which provide that if a juvenile is charged with a felony, neither he nor his parents may waive counsel.⁹³ This contrasts sharply with the earlier case of *State v. Braden*,⁹⁴ in which the court held that a seventeen-year-old defendant effectively had waived counsel. One difference between the two cases is that only one of the two statutes was in effect when *Braden* was decided.⁹⁵ Another is the difference in the records. The record in *Braden* revealed that the defendant was very bright, with extensive experience in the criminal justice system. The court concluded he was not one of the "young and unwary" whom the statutes were meant to protect and refused to apply them.⁹⁶ The record in *District Court* revealed only that the defendant was known to be

90. 384 U.S. 436 (1966). The rule is based on the Fifth Amendment's privilege against self-incrimination, U.S. CONST. amend. V, but also protects a defendant's right to counsel, U.S. CONST. amend. VI.

91. — Mont. —, 580 P.2d 1387 (1978).

92. — Mont. —, 577 P.2d 849 (1978).

93. MCA § 41-5-511 (1978) (formerly codified at R.C.M. 1947, § 10-1218(3) (Supp. 1977)): "Neither the youth nor his parent or guardian may waive counsel if commitment to a state correctional facility or to the department of institutions for a period of more than 6 months may result from adjudication."

MCA § 46-8-102 (1978) (formerly codified at R.C.M. 1947, § 95-1002): "A defendant may waive his right to counsel except that in all felony cases where the defendant is under eighteen (18) years of age the defendant shall be represented by counsel at every stage of the proceedings."

94. 154 Mont. 90, 460 P.2d 85 (1969).

95. *Braden*, *id.*, was decided in 1969, while MCA § 41-5-511 (1978) (formerly codified at R.C.M. 1947, § 10-1218(3) (Supp. 1977)) was passed in 1974. Ch. 329, § 18, Laws of Montana (1974).

96. 154 Mont. at 91, 460 P.2d at 86.

a juvenile offender.⁹⁷ It can still be argued that *Braden* establishes an exception to the statutory rule, but the force of that argument has been diminished by the passage of the second protective statute and the decision in *District Court*.

Most confession cases are like *District Court* in that they concern statements made to the police after an arrest, but federal cases hold that *Miranda* must be satisfied even where the purpose of the custody is unrelated to the purpose of the interrogation, and the interrogator does not presently intend to initiate a criminal prosecution.⁹⁸ These federal cases provided the authority for the Montana Supreme Court's decision in *State v. Harris*,⁹⁹ in which the question was whether the statements Harris made at his cellmate's prison disciplinary hearing were admissible at Harris's subsequent trial, even though he was neither given a *Miranda* warning nor criminally charged until after the hearing. The court excluded the statements.¹⁰⁰

V. INITIAL APPEARANCE

All of the cases reviewed above discussed the exclusion of evidence in the context of constitutional rights. *State v. Benbo*¹⁰¹ illustrates that the exclusionary rule also protects statutory rights. After Benbo was arrested and given a *Miranda* warning, he made incriminating statements and led the police to stolen guns. Under Montana's initial appearance statutes,¹⁰² every person arrested must be taken before a judge without unnecessary delay, to be judicially advised of his rights and the charges against him. Benbo had had no initial appearance. The court first noted that the purpose of an initial appearance is not only to ensure the voluntariness of confessions, but also to guarantee a *judicial* reading of rights and charges.¹⁰³ Stating "[i]t is time to recognize the importance of this right," the court held that an unnecessary delay between arrest and

97. ____ Mont. at ____, 577 P.2d at 851-52.

98. See *Mathis v. United States*, 391 U.S. 1 (1968) (I.R.S. agent questioned Mathis in jail cell); *United States v. Redfield*, 402 F.2d 454 (4th Cir. 1968) (statement at prison disciplinary hearing).

99. ____ Mont. ____, 576 P.2d 257 (1978).

100. *Id.* at ____, 576 P.2d at 258. The court did not express its reasoning clearly. A second basis for the court's holding was its conclusion that the prison's rules specifically barred such use of statements made at a disciplinary hearing. *Id.*

101. ____ Mont. ____, 570 P.2d 894 (1977).

102. MCA §§ 46-7-101 and 102 (1978) (formerly codified at R.C.M. 1947, §§ 95-901 and 902). Under the Fourth Amendment, an arrestee must be given a probable cause hearing before he can be held for any extended period of time. *Gerstein v. Pugh*, 320 U.S. 103 (1975). Montana's initial appearance, however, does not serve as a probable cause hearing; therefore it remains a purely statutory requirement.

103. ____ Mont. at ____, 570 P.2d at 899.

initial appearance requires the exclusion of "all evidence obtained during [the] 'unnecessary delay' except that which . . . has no reasonable relationship to the delay whatsoever."¹⁰⁴ The opinion also set out the burden of proof: the defendant must prove the delay was unnecessary; then the burden shifts to the state to prove that its acquisition of the evidence was not reasonably related to the delay. The state failed to sustain its burden in *Benbo*, since the defendant might well have acted differently had a judge explained his situation to him.¹⁰⁵ His statements, and the guns to which he led the police, were excluded from evidence.

VI. CONCLUSION

Although no workable alternative to the exclusionary rule exists,¹⁰⁶ the rule is under attack. The federal courts used to view it as an integral part of the Fourth Amendment's guarantees; now they relegate it to the lowly status of a "remedial device,"¹⁰⁷ designed solely to deter illegal police conduct.¹⁰⁸ Even as a remedy, it has less than unanimous support.¹⁰⁹ The Montana state legislature has attempted to abolish it by statute, though so far without success.¹¹⁰ In the courts of Montana, however, the exclusionary rule is secure in its role as guardian of rights. Its role in Montana has expanded, particularly with respect to the right of privacy and statutory rights, to the point where the Montana version of the rule affords an individual greater protection than does its federal counterpart.¹¹¹ The

104. *Id.* at ___, 570 P.2d at 900 (quoting the rule from *Pa. v. Futch*, 447 Pa. 389, 394, 290 A.2d 417, 419 (1972) (omissions by the court). This approach was first developed by the federal courts with respect to the federal statutory equivalent to an initial appearance. See *Mallory v. United States*, 354 U.S. 449 (1957); *McNabb v. United States*, 318 U.S. 332 (1943). The *McNabb-Mallory* rule was abolished by Title II of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. § 3501(c) (1976).

105. *Benbo's* situation was confusing. The complaint with which he was served stated the crime of theft, because *Benbo* was charged with receiving stolen guns. He did not start talking, though, until after the arresting officers told him they knew he didn't steal the guns.

106. The major reason why the United States Supreme Court held that the state courts must apply the exclusionary rule to evidence obtained in violation of constitutional rights was that other remedies were virtually worthless as a means of ensuring that the police stay within their constitutional powers. *Mapp v. Ohio*, 367 U.S. 643 (1961).

107. Compare *Mapp v. Ohio*, 367 U.S. 643, 651 (1961) with *Calandra v. United States*, 414 U.S. 338, 348 (1974).

108. See *Stone v. Powell*, 428 U.S. 465, 486 (1976).

109. See, e.g., *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 415 (1971) (Burger, C.J., dissenting).

110. See, e.g., S. 217, 46th Legislative Sess. (1979); S.314, 44th Legislative Sess. (1975). These bills have sought to replace the exclusionary rule with criminal, civil, and administrative remedies. The constitutionality of such efforts is debatable.

111. See, e.g., *State v. Brackman*, ___ Mont. ___, 582 P.2d 1216 (1978) (warrantless electronic participant monitoring); *State v. Sawyer*, ___ Mont. ___, 571 P.2d 1131 (1977) (inventory search of impounded car); *State v. Benbo*, ___ Mont. ___, 570 P.2d 894 (1977) (initial appearance).

Montana and federal constitutions limit the power of the police in order to protect us from the unrestrained exercise of police discretion. Without the exclusionary rule, these constitutional limitations would have no substance. We would be subject to police whim and caprice. With it, our rights are well guarded.